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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re A.J. et al., Persons Coming Under the
Juvenile Court Law.

FRESNO COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

L.J.,

Defendant and Appellant.

F066644

(Super. Ct. Nos. 11CEJ300165-1,
11CEJ300165-2)

OPINION

THE COURT*

APPEAL from orders of the Superior Court of Fresno County. Mary Dolas,
Judge.

Carol A. Koenig, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kevin Briggs, County Counsel, and William G. Smith, Deputy County Counsel,
for Plaintiff and Respondent.

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* Before Gomes, Acting P.J., Kane, J., and Detjen, J.

Appellant L.J. (father) appeals from the juvenile court's order issued at a contested Welfare and Institutions Code section 366.26 hearing¹ terminating his parental rights as to his seven-year-old daughter, A.J., and two-year-old son, S.J. He contends the juvenile court violated Penal Code section 2625 by conducting the hearing in his absence and without a waiver. He also contends trial counsel was ineffective. We affirm the juvenile court's order.

PROCEDURAL AND FACTUAL SUMMARY

In August 2011, the juvenile court ordered then five-year-old A.J. and eight-month-old S.J., the subjects of this appeal, detained from the custody of their mother Christina pursuant to allegations Christina had untreated substance abuse and mental health problems and was homeless and unable to care for the children. The Fresno County Department of Social Services (department) placed the children with a maternal cousin.

Christina stated father was not listed on the children's birth certificates, had no involvement with them and did not provide support for them. Consequently, he was initially deemed to be an alleged father. At the time of the children's detention, father was an inmate in Corcoran State Prison with an expected release date of July 2013.

In October 2011, the juvenile court conducted the jurisdictional hearing. Father appeared represented by counsel. The juvenile court adjudged the children dependents of the court under section 300, subdivision (b), ordered father to undergo paternity testing and set the matter for disposition.

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

Father's paternity test results did not exclude him as the children's biological father. He told the department he wanted to be part of the children's lives and present at all hearings.

In February 2012, the juvenile court conducted a contested dispositional hearing on the department's recommendation to deny father reunification services. The primary issue was whether father qualified as the children's presumed father under Family Code section 7611, subdivision (d) by receiving them into his home and holding them out as his natural children and thus legally entitled to services.

Father testified he held the children out as his own as soon as Christina told him she was pregnant with them. He was in custody all but a year of A.J.'s life and all of S.J.'s life. When he was not in custody, he visited A.J. at Christina's home almost every day and took her to his home every other week. A.J. sometimes spent the night with him. Father testified A.J. recognized him as her father and they spent time at the park, eating out, reading and playing games. When he was in county jail, Christina took both children to visit him. He said he last visited A.J. in January or February of 2010.

Father further testified he gave Christina money for the children when she asked for it but did not provide regular support. He wanted to establish his paternity sooner, but thought it would cost money and he could not afford it.

At the conclusion of the hearing, the juvenile court found father was not the children's presumed father. The juvenile court ordered reunification services for Christina, ordered visitation for father, and set a six-month review hearing for July 2012. Father did not appeal from the juvenile court's finding he was not the presumed father and its order denying him reunification services.

By the time of the six-month review hearing, Christina had not completed any of her court-ordered services. Consequently, the department recommended the juvenile

court terminate reunification efforts and set a section 366.26 hearing to implement a permanent plan.

In July 2012, the juvenile court convened the six-month review hearing. Father appeared with counsel who advised the juvenile court that father was participating in substance abuse treatment and scheduled to complete the program in November 2012. The juvenile court set a settlement conference in August and the six-month review hearing in September. Father waived his appearance at the settlement conference and the review hearing so he would not miss any of his treatment.

In August 2012, the juvenile court convened the settlement conference but Christina did not appear. Consequently, the juvenile court vacated the six-month review hearing, terminated Christina's reunification services, and set a section 366.26 hearing for December 17, 2012.

On December 17, 2012, father appeared telephonically at the section 366.26 hearing and requested a contested hearing on the department's recommendation to terminate his parental rights and order a plan of adoption. The juvenile court set a settlement conference for January 30 and a contested hearing for February 4, 2013. The juvenile court advised father that if he failed to appear at the settlement conference or the contested hearing it would make decisions in his absence. The court also told father that it would authorize him to appear telephonically at the settlement conference, but that if he wanted to testify at the contested hearing he had to personally appear. The juvenile court issued removal orders (Pen. Code, § 2625) for father's appearance at the settlement conference and contested hearing.

Prior to the settlement conference, the juvenile court received a faxed copy of the preprinted form JV-451, "Prisoner's Statement Regarding Appearance at Hearing Affecting Parental Rights" on which father checked boxes indicating that he did not want to personally attend and gave up his right to attend the settlement conference. In

addition, he indicated that he understood the purpose of the contested hearing was to terminate his parental rights and select a permanent plan of adoption for his children and that he had an attorney to represent him at the hearing. Father signed and dated the form.

Father did not personally appear at the settlement conference. The juvenile court noted that father waived his appearance and confirmed the contested hearing date, anticipating that father would be transported for the contested hearing.

In its report for the contested hearing, the department informed the juvenile court Christina did not regularly visit the children and father was unable to visit them in prison because of the restrictive prison regulations. The department was able, however, to arrange a visit for him at the county jail in July 2012. Because of father and Christina's limited contact with the children, the department could not assess the nature and quality of their relationships with the children.

The department opined father and Christina did not have a parent/child bond with A.J. and S.J. and it would not be detrimental to terminate their parental rights. The department also opined the children were adoptable and strongly bonded to their care provider who wanted to adopt them.

On February 4, 2013, the juvenile court convened the contested hearing. Father was not transported for the hearing and his attorney told the juvenile court she had not had any contact with father and was unsuccessful in contacting prison officials to determine if he planned to personally appear.

The juvenile court proceeded with the hearing and heard argument. Father's attorney argued father did everything he could to elevate his paternity status. She also argued he believed he had a bond with A.J., though admittedly not with S.J. She said father strongly opposed the termination of his parental rights and urged the court to order a legal guardianship.

At the conclusion of the hearing, the juvenile court terminated Christina and father's parental rights. This appeal ensued.

DISCUSSION

I. The Juvenile Court Erred in Conducting the Section 366.26 Hearing but the Error was not Prejudicial.

Penal Code section 2625, in effect, provides that when an incarcerated parent has expressed his or her desire to attend the section 366.26 hearing and the juvenile court has issued an order for the production of that parent, the court may not proceed “without the physical presence of the prisoner or the prisoner’s attorney, unless the court has before it a knowing waiver of the right of physical presence signed by the prisoner or an affidavit signed by [an official] stating that the prisoner has, by express statement or action, indicated an intent not to appear at the proceeding.” (Pen. Code, § 2625, subd. (d).)

Father contends the juvenile court erred by conducting the section 366.26 hearing in his absence under Penal Code section 2625, subdivision (d). We agree. The statute requires either the prisoner’s personal appearance or an executed waiver of his or her presence. (*In re Jesusa V.* (2004) 32 Cal.4th 588, 623-624 (*Jesusa V.*)). In this case, the juvenile court issued an order for father’s appearance at the section 366.26 hearing. However, father did not appear and did not execute a waiver of his appearance. Therefore, the juvenile court erred in conducting the section 366.26 hearing in father’s absence.

We conclude, however, the juvenile court’s error was not prejudicial. (*Jesusa V.*, *supra*, 32 Cal.4th at p. 625.) Father contends otherwise. He claims the juvenile court prevented him from elevating himself to presumed father status under *Kelsey S.*² and establishing the “beneficial relationship exception” to adoption under section 366.26,

² *Adoption of Kelsey S.* (1992) 1 Cal.4th 816 (*Kelsey S.*).

subdivision (c)(1)(B)(i). Assuming these arguments were available to father, there is no evidence on the record to support them, nor does he offer any such evidence on this appeal.

A. *Kelsey S.*

In order for a biological father to attain presumed father status under *Kelsey S.* he must show he promptly came forward and demonstrated a “full commitment to his parental responsibilities—emotional, financial and otherwise”; the child’s mother thwarted his efforts to assume his parental responsibilities; and he demonstrated a willingness to assume full custody of the child. (*Kelsey S.*, *supra*, 1 Cal.4th at p. 849.)

Assuming father did not forfeit his *Kelsey S.* claim by not raising it at the paternity hearing, his testimony at the paternity hearing refutes it. According to father, Christina facilitated—not thwarted—his ability to parent the children. She allowed him regular visits with A.J. and even permitted overnight visits. She also took the children to visit him at the county jail. Further, father admitted not providing regular financial support or attempting any legal action to elevate his paternity. Thus, father’s status, had he appeared at the section 366.26 hearing, would have remained the children’s biological father.

B. *The “Beneficial Relationship Exception”*

Assuming father had standing as a biological father to assert an exception to adoption, there is no evidence to support it. At a section 366.26 hearing, the juvenile court must terminate parental rights and free the child for adoption if it determines by clear and convincing evidence the child is adoptable, and none of the seven exceptions listed in section 366.26, subdivision (c)(1)(A) and (B) applies to make termination of parental rights detrimental to the child. (§ 366.26, subd. (c)(1).)

Father contends he could have asserted the exception to adoption under section 366.26, subdivision (c)(1)(B)(i), often referred to as the “beneficial relationship

exception.” This exception applies if termination of parental rights would be detrimental to the child because the “parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.”

Father argues he could have established the exception by testifying about his relationship with the children, particularly his bond with A.J. However, in our view, father *did* testify about the relationship. He described how much time he spent with her and how they spent their time together. He also testified she recognized him as her father.

There is no question “[i]nteraction between natural parent and child will always confer some incidental benefit to the child.” However, the kind of relationship intended by the statute is a “substantial, positive emotional attachment such that the child would be *greatly harmed*” if it were severed as through adoption. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575, italics added.)

Moreover, “A child ... should not be deprived of an adoptive parent when the natural parent has maintained a relationship that may be *beneficial to some degree*, but that does not meet the child’s need for a parent.” (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466, italics added.)

At best, the evidence shows father had a positive relationship with A.J. However, there is no evidence a “substantial, positive emotional attachment” existed between them. Nor can we imagine what other evidence father could have presented to convince the juvenile court otherwise given his lack of contact with her. There is no evidence father had any relationship with S.J.

Thus, even crediting father with presumed father status at the section 366.26 hearing, there is insufficient evidence he had a beneficial relationship with the children so as to overcome the adoption preference. Therefore, he was not prejudiced by the juvenile court’s error in conducting the section 366.26 hearing in his absence.

II. Trial Counsel was not Ineffective.

Father contends trial counsel was ineffective for not objecting to the juvenile court's decision to conduct the section 366.26 hearing in his absence. We conclude father's ineffective assistance of counsel claim fails.

To establish ineffective assistance of counsel in dependency proceedings a parent must prove trial counsel's performance was deficient, resulting in prejudicial error. (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1667-1668.) We need not evaluate counsel's performance if appellant fails to prove prejudicial error; i.e., absent counsel's errors, there is a reasonable probability of a more favorable outcome. (*In re Nada R.* (2001) 89 Cal.App.4th 1166, 1180.)

In order to prove his attorney was ineffective, father would have to show that but for his attorney's failure to object, the juvenile court would have secured his presence at the section 366.26 hearing and ruled in his favor. In effect, father would have to show prejudicial error which we have concluded does not exist on this record.

We find no error and affirm.

DISPOSITION

The juvenile court's order issued on February 4, 2013 terminating father's parental rights is affirmed.